

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

DERRICK BRADFORD #467441,

Plaintiff,

v.

Case No. 2:07-cv-128
HON. R. ALLAN EDGAR

WAYNE DESHAMBO,

Defendant.

REPORT AND RECOMMENDATION

Plaintiff Derrick Bradford, an inmate currently confined at the Alger Maximum Correctional Facility (LMF), filed this *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against Defendant Wayne DeShambo, who is employed at LMF as Food Service Director. In his complaint, Plaintiff alleges that he is Jewish and is currently on a Kosher diet, but seeks to be placed on a vegan Kosher diet for religious reasons. Plaintiff states that he is basing his meal request on the original order of “Yahweh” before the fall of man through disobedience. Plaintiff asserts that in the book of Genesis it states that man’s teeth were not designed to eat meat and that his digestive system was not designed to digest it. Men were forced to eat meat as punishment. Plaintiff claims that Defendant has improperly denied his diet request. Plaintiff seeks declaratory and injunctive relief.

Presently before the Court is the Defendant’s Motion for Summary Judgment, pursuant to Fed. R. Civ. P. 56. Plaintiff has filed a response and the matter is ready for decision. Summary judgment is appropriate only if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c);

Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986). If the movant carries the burden of showing there is an absence of evidence to support a claim or defense, then the party opposing the motion must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Id.* at 324-25. The nonmoving party cannot rest on its pleadings but must present “specific facts showing that there is a genuine issue for trial.” *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The evidence must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Thus, any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Muhammad v. Close*, 379 F.3d 413, 416 (6th Cir. 2004) (citing *Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994)). However, a mere scintilla of evidence in support of the nonmovant’s position will be insufficient. *Anderson*, 477 U.S. at 251-52. Ultimately, the court must determine whether there is sufficient “evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252. *See also Leahy v. Trans Jones, Inc.*, 996 F.2d 136, 139 (6th Cir. 1993) (single affidavit, in presence of other evidence to the contrary, failed to present genuine issue of fact); *cf. Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1448 (6th Cir. 1993) (single affidavit concerning state of mind created factual issue).

Plaintiff claims that Defendant’s refusal to provide him with a vegan diet violates his First Amendment right to freely exercise his religious beliefs. Prisoners do not lose their right to freely exercise their religion by virtue of their incarceration. *Cruz v. Beto*, 405 U.S. 319, 322, n. 2 (1972). Freedom of religion being a fundamental right, any regulation which infringes upon it must generally be justified by a “compelling state interest”. *See, for example, Wisconsin v. Yoder*, 406 U.S. 205 (1972). However, as a prisoner, Plaintiff’s constitutional rights are subject to severe restriction. *See, for example, Bell v. Wolfish*, 441 U.S. 520 (1979) (restriction on receipt of reading

materials); *Hudson v. Palmer*, 468 U.S. 517 (1984) (privacy); *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974) (right to call witnesses); *Richardson v. Ramirez*, 418 U.S. 24 (1974) (vote). *See, generally, Washington v. Harper*, 494 U.S. 210 (1990); *Turner v. Safley*, 482 U.S. 78 (1987); *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

Rather, the standard by which prison regulations impinging on prisoner constitutional rights is judged is “reasonableness.” *Turner*, 482 U.S. at 88-95; *Washington*, 494 U.S. at 223-25. In *Turner*, the Supreme Court expressly rejected any degree of “heightened scrutiny” in order to assure that “prison administrators . . . , and not the courts, . . . make the difficult judgments concerning institutional operations.” *Id.* at 89, *quoting Jones v. North Carolina Prisoners’ Union*, 433 U.S. 119 (1977).

In *Turner*, the court set forth four factors “relevant in determining the reasonableness of the regulation at issue.” 482 U.S. at 89-91. First, there must be a “valid, rational connection” between the prison regulation and the legitimate governmental interest put forward to justify it. *Id.* at 89, *quoting Block v. Rutherford*, 468 U.S. 576, 586 (1984). Second, the reasonableness of a restriction takes into account whether there are “alternative means of exercising the right that remain open to the prison inmate.” *Turner*, 482 U.S. at 90. Third, the court should consider the “impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.” *Turner*, 482 U.S. at 90. Finally, the existence or absence of ready alternatives of accommodating the prisoner’s rights is relevant to reasonableness. *Turner*, 482 U.S. at 90. As stated by the court, this final factor “is not a ‘least restrictive alternative’ test.” *Id.* at 90. “Prison officials need not show that “no reasonable method exists by which [prisoners’] rights can be accommodated without creating bona fide [prison] problems.” *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987).

In his motion for summary judgment, Defendant states that on December 22, 2006, Plaintiff requested that he be placed on a Kosher vegan diet with fish and chicken, which is a contradiction because vegans do not eat meat or any other animal products, such as fish and chicken. Plaintiff's request was denied. Defendant notes that Plaintiff is already being provided with a Kosher diet and, contrary to Plaintiff's assertions, nothing in the Bible requires one to be a vegan. In addition, Defendant states that the failure to provide Plaintiff with a diet containing his personal preferences does not violate his constitutional rights.

Defendant attaches a copy of the affidavit of Special Activities Coordinator (SAC) Dave J. Burnett to his brief as Exhibit A. In the affidavit, Burnett attests that he has previously served as chaplain at the State Prison of Southern Michigan and at the Huron Valley Men's Facility. Burnett states that his duties as SAC include coordinating religious programming, volunteer programming, general library services, prisoner organizations, and leisure time programming for the MDOC. As part of his job, Burnett reviews prisoner requests for religious services and diets pursuant to MDOC policy directive 05.03.120. (Defendant's Exhibit A, ¶¶ 3-4.) Burnett attests that "[t]he MDOC has a compelling governmental interest in limiting the Kosher Meal Program to those prisoners whose faith of records both requires Kosher and who demonstrate sincerity by not violating Kosher standards." Burnett further states:

First, allowing prisoners who are not sincere to participate in the Kosher menu is offensive to those who are sincere, and often leads to conflict between the prisoners and between groups of prisoners. Second, there is a compelling economic interest. Providing kosher meals requires extra effort and extra expense. Separate Kosher kitchens are maintained at selected prison sites. It is expensive to build and equip a Kosher kitchen. The Kosher kitchen and Kosher food storage areas are limited in size. There is an interest in using this valuable space only for those who are sincere about the pursuit of their religious faith. Third in addition to the logistical requirements of keeping a kosher kitchen, the meal cost is at two to

three times that of the meals from the main food line. That extra effort and expense should be reserved only for those for whom the meals are a religious requirement, and who demonstrate that they have enough knowledge to enable them to abide by the requirements of their faith.

(Defendant's Exhibit A, ¶ 7.) Burnett further states that Plaintiff asked for a "vegan kosher meal program," but that keeping kosher does not require one to be a vegan. (Defendant's Exhibit A, ¶ 8.)

In his response, Plaintiff claims that pursuant to *U.S. v. Seeger*, 380 U.S. 163, 184-85 (1965), the validity of his beliefs regarding diet may not be questioned, but only the sincerity of his beliefs are open to question. Plaintiff states that Defendant has not shown either that Plaintiff's beliefs are not religious in nature or that they are not sincerely held. However, Plaintiff concedes that he is Jewish, and it is clear from the record that Plaintiff is receiving a Kosher diet, which is what is required by the Jewish faith. The only thing that Plaintiff offers in support of his assertion that his diet should include no meat other than chicken and fish is that the book of Genesis states that man's teeth were not designed to eat meat and that his digestive system was not designed to digest it, so that eating meat is a punishment. However, this statement does not support Plaintiff's claim that his desire to eat only fish and chicken is required by a sincerely held religious belief. In addition, contrary to Plaintiff's assertion, Defendant has not stipulated to Plaintiff's claim that his belief was religious in nature or sincerely held. Therefore, the undersigned concludes that Plaintiff has failed to sustain his burden of proof in response to Defendant's motion for summary judgment.

In addition, Defendant contends that he is entitled to Eleventh Amendment immunity to the extent that he is sued in his official capacity. Any claims against the individually-named Defendant in his official capacity does not state a claim upon which relief can be granted. *See Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) (claims against a state agency or an official in his/her official capacity are claims against the state, and are not claims against a "person")

subject to Section 1983 liability); *Frederick v. Abramajtyts*, No. 94-1935, 1995 WL 564321, **1 (6th Cir. Sept. 21, 1995) (unpublished). Moreover, the Eleventh Amendment bars suit against the State or one of its agencies in federal court unless the state has given express consent, regardless of the relief sought. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984), overruled in part on other grounds, *Will*, 491 U.S. 58; *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (State and Board of Corrections).¹ The State of Michigan has not consented to civil rights suits in the federal courts. *See Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir. 1986). The Eleventh Amendment therefore bars official-capacity suits for damages against its employees. Therefore, any official capacity claims for damages are properly dismissed.

However, in this case Plaintiff clearly states that he is suing Defendant in his “individual and official” capacities. Therefore, because Plaintiff specifies that he is suing Defendant in his individual capacity, the undersigned concludes that Defendant is not entitled to summary judgment on this issue.

Defendant also asserts that he is entitled to qualified immunity. Government officials, performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999); *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997); *Noble v. Schmitt*, 87 F.3d 157, 160 (6th Cir. 1996); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). An “objective reasonableness” test is used

¹ The Sixth Circuit has held that since an official capacity suit for retroactive relief, such as monetary damages, is deemed to be against the State, whose officers are the nominal Defendants, the claim is barred by the Eleventh Amendment. *Doe v. Wigginton*, 21 F.3d 733, 736-737 (6th Cir. 1994).

to determine whether the official could reasonably have believed his conduct was lawful. *Dietrich*, 167 F.3d at 1012; *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

The procedure for evaluating claims of qualified immunity is tripartite: First, we determine whether a constitutional violation occurred; second, we determine whether the right that was violated was a clearly established right of which a reasonable person would have known; finally, we determine whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights. *Williams v. Mehra*, 186 F.3d 685, 690 (6th Cir. 1999).

When determining whether a right is clearly established, this court must look first to decisions of the United States Supreme Court, then to decisions of the Sixth Circuit and to other courts within this Circuit, and finally to decisions of other circuits. *Dietrich*, 167 F.3d at 1012. An official action is not necessarily protected by qualified immunity merely because the very action in question has not previously been held to be unlawful. Rather, in light of pre-existing law, the unlawfulness of the official's conduct must be apparent. *Dietrich*, 167 F.3d at 1012; *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991).

When making a qualified immunity analysis, the facts must be interpreted in the light most favorable to the plaintiff. Part of the analysis is to determine whether there are any genuinely disputed questions of material fact. *Kain v. Nesbitt*, 156 F.3d 669, 672 (6th Cir. 1998). Where there is a genuinely disputed question of fact, it is for the trier of fact to resolve, not the judge. "This would be true notwithstanding that the trial judge found the [defendant] officer to be more credible than the plaintiff because it is not for the court to make credibility determinations at this stage of the proceeding." *Id.*

The operation of the qualified immunity standard depends substantially upon the level of generality at which the relevant legal rule is to be identified.

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of the preexisting law the unlawfulness must be apparent.

Anderson, 483 U.S. at 639-40. *See also Durham v. Nu 'Man*, 97 F.3d 862, 866 (6th Cir. 1996), *cert. denied*, 520 U.S. 1157 (1997).

The Sixth Circuit has observed:

A right is not considered clearly established unless it has been authoritatively decided by the United States Supreme Court, the Court of Appeals, or the highest court of the state in which the alleged constitutional violation occurred.

Durham, 97 F.3d at 866 (citing *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988)).

Thus qualified immunity is not triggered only where the very action in question was previously held unlawful. *Anderson*, 483 U.S. at 639-40. Rather, the test is whether the contours of the right were sufficiently clear that a reasonable official would understand that what he is doing violated plaintiff's federal rights. *Id.*

Furthermore, a defendant need not actively participate in unlawful conduct in order to be liable under Section 1983. Rather, a defendant may be liable where he has a duty to protect a plaintiff and fails to comply with this duty. *Durham*, 97 F.3d at 866-868 (holding that a nurse and a security guard at a state hospital may be liable under Section 1983 where they do not take action to prevent a patient from being beaten). *See also McHenry v. Chadwick*, 896 F.2d 184 (6th Cir. 1990)(a correctional officer who observes an unlawful beating may be liable under Section 1983 even though he did not actively participate in the beating), and *Bruner v. Dunaway*, 684 F.2d 422

(6th Cir. 1982), *cert. denied sub nom, Bates v. Bruner*, 459 U.S. 1171 (1983)(police officers who stood by and observed an unlawful beating by fellow officers could be held liable under Section 1983).

When faced with a qualified immunity defense, the court must first determine whether or not the plaintiff has stated a claim upon which relief can be granted. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Turner*, 119 F.3d at 429. If the court answers that question in the affirmative, the court goes on to determine whether or not the right allegedly violated was clearly established. *Turner*, 119 F.3d at 429. These are both purely legal questions. The immunity issue should not be resolved if there are factual disputes on which the issue of immunity turns such that it cannot be determined before trial whether the defendants' conduct violated clearly established rights. *Hall v. Shipley*, 932 F.2d 1147, 1154 (6th Cir. 1991).

As noted above, there is no genuine issue of material fact that Defendant violated Plaintiff's constitutional rights. Therefore, the undersigned concludes that Defendant is entitled to qualified immunity.

In summary, in the opinion of the undersigned, Plaintiff has failed to sustain his burden of proof in response to Defendant's Motion for Summary Judgment. Accordingly, it is recommended that Defendant's Motion for Summary Judgment (Docket #12) be granted and that this case be dismissed in its entirety.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten (10) days of receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal.

United States v. Walters, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley

TIMOTHY P. GREELEY

UNITED STATES MAGISTRATE JUDGE

Dated: June 9, 2008